IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EMMET JEFFERSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 97 C 4895
	)	
CITY OF CHICAGO,	)	Honorable Wayne R. Andersen
	)	
Defendants.	)	

MEMORANDUM, OPINION AND ORDER

The plaintiff, Emmet Jefferson ("Jefferson") has filed a six-count Complaint alleging that defendants City of Chicago ("City") and James Hall, Francis Blake, Michael Sulewski, and Joseph Busking ("individual defendants") discriminated against him in violation of Title VII, 42 U.S.C. § 2000e, and 42 U.S.C. Sections 1981 and 1983. The City and the individual defendants have moved for summary judgment on the Complaint. For the reasons stated below, we grant this motion in part and deny it in part.

BACKGROUND

The facts are taken from the parties' statements of facts filed pursuant to Local Rule. Jefferson is an African-American male residing in Chicago who works for the City Department of Water as an engineer. Jefferson has sued his employer and four of his co-employees at the Western Avenue Pumping Station ("Western").

In 1985, Mr. Jefferson came to work for the City of Chicago Department of Water as a vacation-relief operating engineer-group C. After a brief layoff, the Department of Water hired Mr. Jefferson as a full-time engineer. He was promoted to Assistant Chief

Operating Engineer of the Central Park Pumping Station in 1993. In 1995, Mr. Jefferson was transferred to the Department of Water's Western Avenue Pumping Station as an Assistant Chief Operating Engineer.

Jefferson's claims of racial discrimination center on four alleged injuries. He complains that his supervisor, Joseph Busking, who is named as a defendant here, allocated overtime in a racially discriminatory manner. He further complains that he was forced to work in unsafe conditions and that this decision also was motivated by race. He further contends that the City and the individual defendants retaliated against him after he filed an EEOC complaint when it twice denied him a promotion to which he allegedly was entitled and when the City unfairly administered a suspension.

Some of these allegations stem from events occurring on July 13, 1996. In the immediate two-week period before July 13th, Busking had denied Jefferson overtime on a few occasions and Jefferson had filed grievances concerning these decisions. When Jefferson arrived for his 2:30-10:30 P.M. shift at Western, he learned that the Number 2 boiler had a problem with its pneumatic damper control. As a result of these problems, the controls for Number 2 boiler had to be operated manually. In spite of this, the master steam pressure for Western was maintained at approximately 290 pounds which was well within the normal operating range for the plant.

Jefferson asked an employee, John King, to work overtime because he believed an extra man was necessary to maintain safe operation of the plant. However, Jefferson admits that he had operated the plant under similar, if not identical, circumstances in the past without an extra man being necessary. Busking learned about Jefferson's decision

when he telephoned the plant and was upset that Jefferson had authorized the overtime. Busking then asked to speak with Jefferson.

There is a dispute as to what was said during their subsequent conversation. Jefferson testified that Busking asked him: "What the f_ _ _ do you think you are doing, you black mother f_ _ _ _ _? Why are you holding anyone over?" According to Jefferson, he then explained that he was holding John King so that he would have enough people to operate the boiler manually. During their conversation Jefferson alleges that Busking called him a black mother f_ _ _ _ _ four or five times. Busking denies using any racial epithets during this conversation or during any of their subsequent conversations.

Approximately fifteen minutes after their initial conversation, Jefferson paged Busking. Busking returned the page from a car phone en route to Western and, according to Jefferson, again called him a black mother f_ _ _ _ _ at least two more times. When Busking arrived at Western, Jefferson met him at the entranceway. Jefferson claims that Busking pushed him and said, "get out of my way you black mother f_ _ _ _ _." (There is no corroboration for this conversation and Busking denies both the push and the conversation.) Busking immediately sent King home. Jefferson also claims that Busking appeared to be intoxicated. He primarily bases this observation on the fact that Busking slurred his words.

After his alleged encounter with Busking, Jefferson called Charlie Daniels, the Deputy Commissioner in charge of security for the Department of Water because he still believed the plant to be potentially unsafe. Jefferson told Daniels what allegedly had transpired and that Busking was under the influence of alcohol. Daniels instructed

Jefferson to call 911 to have Busking removed from the plant. In his 911 call, Jefferson told the dispatcher that Busking had called him a "mother f _ _ _ _ _ _", but omitted the racial slur. After Jefferson made a second 911 call, police officers arrived. Although the officers did not give Busking a sobriety test, they did not perceive him to be intoxicated, did not arrest him and decided not to escort him from the property.

In his charge and amended charge before the EEOC (filed on July 22 and August 1, 1996 respectively), Jefferson complained that he was discriminated against based on his race when he was denied overtime and subjected to unsafe conditions at Western. He further complained that he was subjected to profane language and subject to retaliation. The EEOC ultimately issued him a right to sue letter.

On October 24, 1996, Jefferson received a suspension notice, signed by defendant Hall, suspending him for five consecutive working days without pay, commencing October 29, 1996. This suspension was based on Jefferson's actions on July 13, 1996. Jefferson grieved this suspension, and has asserted that this grievance was handled by defendant Sulewski, but an independent arbitrator found against him and ruled that the suspension was proper.

Approximately ten months after he filed his complaint with the EEOC, Jefferson applied for a promotions to the Chief Operating Engineer's position at the Western and South facilities. He did not receive either of these promotions. According to defendant Blake, the Deputy Commissioner of the Water Department, the hiring criteria for these positions included the quality and relevance of previous job experience, the quality and relevance of supervisory experience, previous satisfactory performance in positions involving similar duties, and written communications skills. Neither side has offered any

evidence concerning the number of African-American applicants for either promotion. Among the panel of interviewers, Jefferson scored seventh among the thirteen candidates for the Western position and sixth among the eleven candidates for the South position. None of the individually named defendants played any role in interviewing and scoring of the individual candidates. The City proffered evidence that it filled eleven vacancies for the Chief Operating Engineer between 1988 and 1997. Three African-American candidates were chosen to fill these positions.

Jefferson has sued four individual defendants in addition to the City. According to Jefferson, he named Blake, the Deputy Commissioner of the Department of Water, as a defendant. Jefferson did so because he believed that Blake could have prevented his suspension, but he admitted that he has no knowledge of how Blake was involved, if at all, in that decision. He named Sulewski, who was the Department of Water Employee Relations Supervisor, as a defendant because he allegedly did not conduct an appropriate investigation of the incident leading to his suspension. (This suspension, however, was fully grieved before an arbitrator following an investigation.) According to Jefferson, he named defendant Hall, the Engineer of Water Pumping, in the suit because he tried to fire Jefferson as a result of the July 13, 1997 incident and ultimately was responsible for the imposition of his suspension. Defendant Busking's decision to overrule Jefferson's decision to add an extra man to the shift on July 13th, as well as his alleged use of racial slurs, form the basis of the allegations against him individually.

Jefferson has sued the City of Chicago under Title VII and 42 U.S.C. Sections 1981 and 1983, alleging disparate treatment based on race. He alleges that the City

discriminated against him when it subjected him to racial slurs, denied him overtime and forced him to work in unsafe conditions. He also has sued the City under Title VII and Sections 1981 and 1983 for retaliating against him after he filed a discrimination claim when it denied him a promotion and suspended him for five consecutive working days. Jefferson sued the individual defendants alleging the same facts and legal theories. Jefferson claims that the individual defendants are liable to him in their official as well as individual capacities and requests punitive damages from them.

DISCUSSION

Summary judgment is proper only when the complete record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating the absence of evidence to support the position of the nonmoving party. Doe v. R.R. Donnelley & Sons Co., 42 F.3d 439, 443 (7th Cir. 1994). The burden then shifts to the nonmoving party to establish that there are no genuine issues of material fact and that the nonmoving party is not entitled to judgment as a matter of law. Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986). A genuine dispute about a material fact exists only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

In ruling on a motion for summary judgment, the Court must draw every reasonable inference from the record in the light most favorable to the nonmoving party and should not make credibility determinations or weigh evidence. Association Milk Producers, Inc. v. Meadow Gold Dairies, Inc., 27 F.3d 268, 270 (7th Cir. 1994). The nonmoving party must support its assertions with admissible evidence and may not rest

upon the mere allegations in the pleadings or conclusory statements in affidavits. Celotex, 477 U.S. at 324. Additionally, Rule 56(c) mandates summary judgment when the nonmoving party fails to establish the existence of an element essential to its case and on which that party will bear the burden of proof at trial. The production of only a scintilla of evidence will not suffice to defeat a motion for summary judgment. Anderson, 477 U.S. at 252. The general standard for summary judgment cases is applied with added rigor in employment discrimination cases, where intent is inevitably the central issue." McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 371 (7th Cir. 1992). At the same time, however, employment discrimination cases, while often turning on factual questions, are nonetheless amenable to summary judgment when there is no genuine dispute of material fact or when there is insufficient evidence to demonstrate the presence of the alleged motive to discriminate. Cliff v. Board of School Commrs, 42 F.3d 403, 409 (7th Cir. 1994). We keep these standards in mind as we now turn to examine the motion before us.

A. Disparate Treatment Claim Against City

Jefferson alleges that the City discriminated against him on the basis of his race in violation of Title VII and Sections 1981 and 1983 when it forced him to work in unsafe conditions, denied him overtime and subjected him to racial slurs. With respect to the first two alleged employment actions, Jefferson concedes that he has no direct evidence that these actions were racially motivated. However, Jefferson may also establish a prima facie case through indirect evidence if he can show that 1) he is a member of a protected class; 2) he performed his job satisfactorily; 3) despite the satisfactory performance he suffered an adverse employment action; and 4) he was treated differently than similarly

situated employees who were not members of a protected class. McDonnell-Douglass Corp. v. Green, 411 U.S. 792, 804 (1973). Once a prima facie case has been established, the burden then shifts to the employer to articulate some legitimate nondiscriminatory reason for its action. Id. If the employer is able to provide such a reason, then the burden shifts back to the employee to prove by a preponderance of the evidence that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1976) (quoting McDonnell Douglass at 804). A pretext may be demonstrated either directly by persuading the court that a discriminatory reason more likely motivated by the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. at 256.

The undisputed evidence before this court does not establish a prima facie case of discrimination. Although Jefferson is a member of a protected class, and even assuming he was satisfactorily performing his job, he has failed to adduce sufficient evidence to demonstrate that he either suffered an adverse employment action or that any action taken by the City was motivated by race. More simply put, Jefferson has not produced any credible evidence from which a jury could conclude that he either was denied overtime or worked in unsafe conditions, let alone that any of City's actions were racially motivated.

Jefferson alleges that he was forced to work in an unsafe environment on July 13, 1996. Specifically, Jefferson alleges that Busking's order sending King home put Jefferson in danger. Other than Jefferson's subjective feeling that this was the case, which is not enough to support a denial of summary judgment, there is no evidence to support this claim. The plant was running at normal pressure throughout the day, even after King

was sent home. Further, identical boiler problems had occurred in the past when Jefferson was present at the plant and he admits that he did not believe it was necessary on those occasions to add an extra man.

Jefferson also contends that Busking's alleged intoxication made the working environment unsafe. Again, other than Jefferson's assertion that Busking was drunk, we find no evidence demonstrating that he was in fact intoxicated. Co-workers did not observe any signs of intoxication. Police officers arriving at the scene, although they did not administer a sobriety test, did not see signs that Busking was intoxicated and did not remove him from the plant.. Moreover, Jefferson offers no evidence to show that Busking, even assuming he was intoxicated, interfered with any of the controls or machinery which arguably might affect the safety of the facility. Even assuming that Busking's removal of the extra worker caused the plant to be unsafe, Jefferson has not shown that he, an African-American, was treated differently than other workers working at the facility during the time period in which it supposedly operated in an unsafe manner. There is no evidence to support Jefferson's claim that the City disparately treated him on the basis of race with respect to his working conditions.

Jefferson similarly fails to show that the City treated him differently in its decisions concerning overtime. The evidence shows that Jefferson actually worked overtime on several of the occasions about which he complains. In his EEOC charge, Jefferson complained that he was wrongfully denied overtime on July 4, 1996, July 6, 1996, July 9, 1996 and July 11, 1996. From July 1, 1996 to July 15, 1996. However, during this period, Jefferson had the opportunity to work 32 hours of overtime, more than any Assistant Chief Operating Engineer at Western. On July 4, Jefferson worked his

scheduled 8 hours at double time and a half. On July 2, July 3, July 7 and July 10, Jefferson worked at least 8 hours of overtime per day. On July 9, one of the days Jefferson complains he did not receive overtime, he sustained an injury at work and had to visit the city doctor. We simply cannot find any evidence that Jefferson was treated worse than than any other worker. In fact, the evidence is to the contrary. The fact that his overtime requests were not always approved does not, in and of itself, establish a discrimination claim.

Finally, the challenged racial epithets which Busking allegedly used towards Jefferson, even assuming that they occurred, do not come close to establishing a hostile environment employment discrimination claim. Whether a hostile working environment exists depends on the quantity, frequency, and severity of the racial, ethnic, or sexist slurs create a work environment so hostile as to discriminate against the minority employee." Vore v. Indiana Bell Tel. Co. Inc., 32 F.3d 1161, 1164 (7th Cir. 1994). Relatively isolated instances of non-severe misconduct will not support a claim of hostile environment. Ngeunjunter v. Metroplolitan Life Ins. Co., 146 F. 3d 464, 467 (7th Cir. 1998). The remarks that Jefferson challenges, which allegedly occurred on a single day by a single employee, do not meet this rigorous standard.

Jefferson's disparate treatment claims under Sections 1981 and 1983 against the City are identical to those he has brought under Title VII. Section 1981 provides that "[a]ll persons...shall have the same right...to make and enforce contracts,...as is enjoyed by white citizens" and this right is protected from impairment under color of state law. 42 U.S.C. §§ 1981(a) and (c). Section 1983 provides a remedy for those who have suffered a deprivation of their constitutional rights, as well as other rights secured by the laws of

the United States. It is undisputed that the discrimination alleged here has taken place under color of state law and, therefore, our analysis of whether Jefferson has established a prima facie case here is substantially the same as our Title VII analysis. Title VII and Section 1981 differ in the types of discrimination they proscribe, the methods of proof are essentially identical. Johnson v. City of Fort Wayne, Ind., 91 F.3d 922, 940 (7th Cir. 1996). As we already have explained, Jefferson has failed to establish that the City discriminated against him based on his race, therefore we grant summary judgment on Jefferson's Section 1981 claim which alleges disparate treatment against the City. (We note that, in addition to establishing race discrimination, Jefferson would have the additional burden of establishing that the individuals who allegedly discriminated against him were enforcing a city policy or custom to hold the City liable for their acts. We need not reach this question, however, because we find that Jefferson has failed to adduce evidence to establish a prima facie case of discrimination.)

B. Retaliation Claim Against the City

Title VII prohibits an employer from discriminating "against any of his employees. . . because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this subchapter." 42 U.S.C. §2000e-3(a). To establish a prima facie case of retaliation under Title VII, a plaintiff must show that he (1) engaged in statutorily protected expression;" (2) "suffered an adverse employment action by h[is] employer;" and (3) "there is a causal link between h[is] protected expression and the adverse action." Sweeney v. West, 149 F.3d 550, 555 (7th Cir. 1998).

Jefferson alleges that the City unlawfully retaliated against him after he filed discrimination charges with the EEOC. Jefferson contends that the City retaliated against him when it (1) denied him overtime; (2) denied him a promotion to Chief Operating Engineer at the Central and Western plants; and (3) suspended him for five working days following the July 13, 1996 incident.

We already have concluded that Jefferson received more, not less, overtime than similarly situated employees, so Jefferson's claim of retaliation also fails. The second alleged act of retaliation is the City's failure to promote Jefferson to the position of Chief Operating Engineer at the Central and South Shore pumping stations. To prevail on this claim, Jefferson must demonstrate that the city would not have taken the adverse action but for the protected expression. McKenzie v. Illinois Dept. of Transp., 92 F.3d 473, 483 (7th Cir. 1996). The amount of time between the protected activity and the adverse action may be, but is not always, proof of such a causal link. See Davidson v. Midlefort Clinic, Ltd., 133 F.3d 499, 511 (7th Cir. 1998) (holding that a causal nexus between protected activity and adverse action can be established by showing that "the employer's adverse action follows fairly soon after the employee's protected expression.")

In this case, the City made its promotion decisions a full made ten months after Jefferson filed his charge. More importantly, however, the undisputed evidence demonstrates that the City failed to promote Jefferson on both occasions because he was not the most qualified candidate for the job. The evidence demonstrates that two different panels of evaluators independently scored Jefferson in the middle of the pack for the positions. In each case, the individual promoted received the best score. Jefferson's only argument in the face of this evidence is that there is a long-standing policy at the Water

Department not to promote African-Americans. However, but the proof before this court indicates that three out of eleven positions for chief operating engineer were filled by African-Americans which hardly supports Jefferson's claim.

Jefferson also contends that the City retaliated against him by wrongfully suspending him for his actions on July 13, 1996 for five consecutive working days. This suspension occurred four months after Jefferson filed his EEOC charge. Defendant Hall, who was responsible for the decision, indisputably was aware of the EEOC claim. The long delay between the imposition of Jefferson's discipline and the incident for which he was disciplined drew the attention of Commissioner Judy Rice. She wrote a memo asking why defendant Hall requested was asking for a suspension in October for events that happened in July. Hall responded that he had waited until September because he "was trying to be as thorough as I possibly could in the investigation."

Jefferson has submitted evidence that other similarly situated employees suspensions were imposed over scheduled working days and days off which has the effect of lessening the overall penalty. In addition, Hall has admitted that his customary policy was to spread such suspensions over working and non-working days. Jefferson's suspension however, which was imposed on five consecutive working days, broke from Hall's policy and placed Jefferson in a worse position than those similarly situated, but not in the protected class.

Surprisingly, the City did not submit any evidence to refute this. Instead, it relies on Filipovic v. K & R Exp. Systems, Inc. Systems, Inc., 176 F.3d 390, 399 (7th Cir. 1999), which generally states that a four month gap between protected activity and alleged retaliation is too long to establish a causal link, especially in light of arbitrator's ruling

upholding the disciplinary action. However, the City's reliance on this case without more is unpersuasive. Jefferson does not claim that the act of retaliation was the suspension, but instead was the manner in which the suspension was administered. The arbitration hearing may have revealed a reason for this apparently unusual decision, but the City has not told the court what it is and we are not going to guess. Because Jefferson has established the elements of a prima facie case of retaliation, and the City has not refuted that case, we must deny summary judgment regarding this claim.

Jefferson reiterates his retaliation claims against the City under Sections 1981 and 1983. As we already have stated, these claims and claims under Title VII are analyzed in the same manner. Bratton v. Roadway Package Systems, Inc., 77 F.3d 168, 167 (7th Cir.1996). We already have found that most of Jefferson's claims are not cognizable under Title VII and, therefore, they also fail to establish a claim under Sections 1981 and 1983. However, Jefferson has established a prima facie case for retaliation concerning his suspension. Therefore, we must also analyze whether he has satisfied his burden under Sections 1981 and 1983.

The City, which officially prohibits such retaliation, is not liable for the alleged conduct unless Jefferson can show that the acts about which he complains constitute a policy, practice or custom. Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 694 (1978). Jefferson has failed to do this. The acts of a single Water Engineer, James Hall, do not constitute an official policy, practice, or custom. The City's motion for summary judgment, therefore, is granted on Jefferson's retaliation claims alleged as violations of Sections 1981 and 1983 against the City.

C. Claims Against Individual Defendants

Jefferson has alleged all of the claims that he made against the City against the individual defendants in their official and personal capacities under Sections 1981 and 1983. Of course, as the City points out, the claims against defendants in their official capacity are simply claims against the City. We already have entered judgment against Jefferson with respect to all of those claims. We also must enter judgment against Jefferson on these identical claims alleged against the City officials.

We further enter judgment against Jefferson on his Sections 1981 and 1983 claims against the individual defendants in their personal capacity, with the exception of defendant Hall whom we will address below. We are troubled that Jefferson would persist in pursuing claims against defendants Blake and Sulewski when, by his own admission, he cannot attribute any specific acts to them. In any event, we already have analyzed the merits of these claims and, with the exception of Jefferson's retaliation claim regarding his suspension, Jefferson has failed to establish the elements of a prima facie case of discrimination. Therefore, we enter judgment against him on the identical claims alleged against the individual defendants.

With respect to the retaliation claim for his suspension, we have found that a genuine issue of material fact exists as to whether Jefferson's suspension was an act of retaliation. The evidence before the court is that defendant Hall made this decision. Therefore, we must analyze whether Hall has qualified immunity from suit for the alleged conduct.

Qualified immunity shields government officials performing discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable would have known."

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The determination of qualified immunity depends upon whether "the law was clear in relation to the specific facts confronting the public official" and "whether reasonably competent officials would agree on the application of the clearly established rights to a given set of facts." McDonnell v. Cournis, 990 F.2d 963, 968 (7th Cir. 1993).

As Judge Williams already recognized when she ruled on the defendants' motion to dismiss, the right to be free of retaliation for exercising one's statutory right of redress for employment discrimination was clearly established at the time that Hall acted as he did. Therefore, we also cannot find him immune from personal suit or from a claim of punitive damages which necessarily will turn on the facts as presented to a jury.

CONCLUSION

For the reasons stated above, we enter judgment against Jefferson and for the City and the individual defendants on Counts One and two of the Second Amended Complaint. We further enter judgment against him and for the City and the individual defendants on Count Three with the exception of Jefferson's retaliation claim regarding his suspension as alleged under Title VII against the City, and alleged against defendant Hall under Sections 1981 and 1983. Finally, we enter judgment against Jefferson, and for the individual defendants, on Count Four with the exception of Jefferson's Section 1983

claim against defendant Hall.

It is so ordered.

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Wayne R. Andersen
United States District Judge

Dated: _____